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The Foreign Service and a New Worldwide Compensation System

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The Foreign Service and a New Worldwide Compensation System

Summary

The George W. Bush Administration seeks to change the federal personnel system, which it characterizes as a “one-size fits all,” longevity-based personnel and pay system, to what it describes as a market sensitive, performance-based pay system. Removing federal employees at the Departments of Defense and of Homeland Security from the General Schedule (GS) to separate performance-based systems was the first major step taken and, if fully implemented, will cover more than half of all non-uniformed federal employees. The Administration also sent to the House and the Senate the Working for America Act (WFAA), as a model for legislation to create a new Federal Schedule for the remaining federal civil service employees. (To date, WFAA has not been introduced as legislation.)

In this same vein, Congress is currently considering two bills, H.R. 6060 and S. 3925, that would allow the Administration to establish a new Foreign Service performance-based compensation schedule. These bills also eliminate the current pay difference between being posted abroad and being posted in the continental United States for those members of the Foreign Service at the upper mid-level rank of 01 and below. Currently the difference in pay levels between service abroad and service in Washington, DC is over 17%. In 2005, because the Senior Foreign Service personnel system was converted to a performance-based system, the members of the Senior Foreign Service are paid at the Washington, DC, level regardless of their postings.

Both of the performance-based systems proposed in the House and Senate bills are supported by the Administration and the American Foreign Service Association (AFSA), the recognized bargaining agent for the Foreign Service in the Departments of State, Commerce, and Agriculture as well as in the United States Agency for International Development (USAID) and the International Broadcasting Bureau (IBB). However, while the concepts behind the legislation are supported by the Administration and the employee union, and appears to have both bipartisan and bicameral support, some members of the Foreign Service and some labor representatives of federal employees are concerned about the loss of automatic pay increases, and some question the intent of the Administration with regard to the rights of labor.

This report, which will be updated as events unfold, discusses (1) the background leading to a proposal to change the compensation system from both an Administration perspective and labor perspective, (2) the current Foreign Service (FS) System as established in the Foreign Service Act of 1980 (P.L. 96-465) and why the Foreign Service views its personnel system as already a performance-based system, (3) the outlines of a new system being proposed in both bills based upon the commonalities in the bills, (4) the major difference between the two legislative proposals, and (5) a cost estimate.

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The Foreign Service and a New Worldwide Compensation System

Most Recent Legislative Developments

On July 31, 2006, the Administration submitted to the House Committee on International Relations (HIRC) and the Senate Committee on Foreign Relations (SFRC) draft legislation that would create a new pay-for-performance/world-wide compensation system for the Foreign Service (FS). This new system, with a one-year transition period, would become fully effective in April 2008. The proposal is supported by the American Foreign Service Association (AFSA), the recognized bargaining agent for the Foreign Service in the Departments of State, Commerce, and Agriculture as well as in the United States Agency for International Development (USAID) and the International Broadcasting Bureau (IBB).

On September 29, H.R. 6060, the Department of State Authorization Act of 2006, was placed on the Union Calendar for the Committee of the Whole House. Earlier on September 13, 2006, the House Committee on International Relations considered and reported H.R. 6060 (H.Rept. 109-168). Sections 14-16 of the bill place the Foreign Service on a pay-for-performance system and create a common worldwide compensation system at the Washington, DC, level for the Foreign Service. Currently, there is a new discussion draft being developed to be offered possibly as a substitute when H.R. 6060 goes to the floor of the House for consideration.

On September 21, 2006, Senator Lugar introduced, as an original measure, S. 3925, the Foreign Affairs Management Authorities Act of 2006. On September 25, it was placed on the Senate Legislative Calendar. Title I of this bill also creates a new pay-for-performance system for the Foreign Service and a uniform worldwide pay scale. Senator Lugar also drafted a substitute amendment to S. 3925 possibly to be offered when that bill is considered.

Introduction

Two bills introduced in the 109th Congress, H.R. 6060, the Department of State Authorities Act of 2006, and S. 3925, the Foreign Affairs Management Authorities Act of 2006, provide differing authorities for the Department of State and the Broadcasting Board of Governors. However, a key part in each bill proposes to change the compensation structure of the United States Foreign Service by (1) placing the Foreign Service compensation system fully on a pay-for-performance basis, and (2) eliminating the current disparity in pay between service abroad and

service in the United States by creating a new world-wide pay structure at the Washington, DC, salary level.

The Foreign Service personnel system, which is separate and quite different from the General Service system, was created under the authorities provided by the Foreign Service Act of 1980 (P.L. 96-465). There are about 13,000 Foreign Service Officers and Specialists with two-thirds of them serving abroad at over 250 posts and missions at any one time. The remaining third is generally posted in Washington, DC. Typically, members of the Foreign Service spend two-thirds of their careers abroad serving at a post from one to three years, and then are assigned elsewhere in the world. In terms of levels or rank within the Foreign Service, it is divided into two categories. The Senior Foreign Service (SFS), is divided into 5 pay categories and, like the Civil Service Senior Executive Service (SES), requires a presidential appointment into the senior service. The regular Foreign Service is divided into nine ranks or classes with the 01 level the highest. Most Foreign Service Officers enter the Foreign Service at the 05 or 06 levels, and generally serve for four to five years before being tenured and commissioned as Foreign Service Officers. The personnel system is basically an “up-or-out” system that reviews the members of the Foreign Service annually and has both Time-in-Class (TIC) and Time-in-Service (TIS) limitations that require promotions within certain time frames or the person is separated from the Service. Because of this system, most members of the Foreign Service leave the service after a full and distinguished career in their mid-50s at an 01 or 02 rank.

Beginning in 1990, with the creation of locality pay adjustments for federal employees, a pay gap began for the Foreign Service depending upon whether one was posted in Washington, DC, or abroad because locality pay adjustments were not available for positions abroad. Each year the gap increased and by 2006, an individual’s salary was 17.5% higher if he/she served in Washington as opposed to serving abroad. Proponents of revision to the Foreign Service system indicated that the gap now impacts morale and the assignments procedure, and vitiates the intent of adjustments like hardship and danger pay differentials. They point out that if a person were to go to a 15% hardship post from a Washington assignment, that person would still experience a 2% decrease in salary. The elimination of this difference became a major issue for the members of the Foreign Service and its union, the American Foreign Service Association.

The George W. Bush Administration, however, has opposed any changes in the compensation system of the Foreign Service unless it was linked to performance, and part of an overall review of Foreign Service personnel modernization. The Administration has clearly stated its belief that the current civil service system is ineffective and needs to be tied to a market-sensitive, performance-based system. Thus for the Administration, any changes for Foreign Service would also have to include a performance-based pay system.

The basic Foreign Service compensation/personnel system framework presented in both H.R. 6060 and S. 3925 is supported by both the Administration and the American Foreign Service Association (AFSA).

For the Administration to arrive at a point where it could support a legislative proposal overhauling the Foreign Service pay structure, the proposal needed to eliminate automatic pay adjustments and base all salary adjustments on performance. AFSA also sought certain basic assurances in order to support the move to a new pay-for-performance/global rate of pay system. There would have to be sufficient funds to implement and sustain a pay-for-performance system. Selection boards would have to continue their important role in evaluating and recommending promotions and salary adjustments based on performance, and the traditional, long established relationship between the Foreign Service's recognized bargaining agent and management would have to be maintained. Ultimately AFSA needed to believe that the move to a pay-for-performance system from one that included automatic salary increases would be in the best interests of the members of the Foreign Service.

While the Foreign Service pay-for-performance/global pay schedule proposals in these two bills have the support of both the Administration and the union, and broad support on Capitol Hill, that support is not unanimous. There are some members of the Foreign Service, as well as some Members and staff who have expressed concerns regarding the loss of the automatic nature of the current system with the elimination of both the step increases and the tie to the annual Employment Cost Index (ECI) adjustment. There are also others who question the intent of the Administration, considering the difficulty between labor and the Administration at the Departments of Defense and of Homeland Security as the Administration attempts to institute a new performance-based personnel structure at these two departments.

Those supporting the legislative effort at the Department of State, AFSA, and the respective authorizing committees in the House and Senate have indicated that they are hopeful that either of these bills, or a conferenced version, will pass and be sent to the President during the lame duck session that began on November 13th.

Why Change the Compensation System?

For the Foreign Service: To Eliminate a Major Pay Disparity

The top legislative issue for members of the Foreign Service and AFSA is elimination of the pay disparity that exists between service in Washington, DC, where most Foreign Service personnel are domestically assigned, and service abroad.¹

The *Federal Pay Comparability Act of 1990*, excludes federal employees posted outside the continental United States from receiving locality pay adjustments.²

¹ J. Anthony Holmes (Amb). "President's Views — Overseas Comparability Pay: Defining Issue and Litmus Test," *The Foreign Service Journal*, November 2005, p. 5.

² 5 U.S.C. 5304(c)(4)(B), *Locality-based Comparability Pay* states: "Comparability payments shall not be payable for service performed in any position which may not, under (continued...)"

Locality pay is designed to create pay comparability between federal employees and non-federal workers doing the same levels of work within a specific geographic locality in the continental United States.³ Because there is no basis for comparability for Foreign Service personnel posted abroad to non-federal workers in the United States, those in the Foreign Service, who spend about two-thirds of their careers posted abroad, receive less salary while serving abroad than their colleagues in Washington, DC. This pay difference has been seen as affecting both morale and decisions Foreign Service personnel make when applying for assignments.

Supporters of a changed pay system argued that by FY2006 this difference resulted in more than a 17% pay disparity and “created an increasing pay disincentive to overseas service.”⁴ However, this Foreign Service pay difference exists only for those at the 01 level and below. In 2005, the pay difference was eliminated for those in the Senior Foreign Service as they went to a pay-for-performance system. At that time, all members of the Senior Foreign Service were brought to the Washington, DC, salary levels regardless of where they were posted.⁵ AFSA reportedly estimated in 2005 that a member of the Foreign Service who had been hired in 1995 and served a standard 27-year career, leaving at the 01 level, would lose \$444,162 in pay and retirement benefits over the course of that career when compared to a similar individual in the Civil Service who served only in Washington, DC.⁶

Surveying its members in August 2005, AFSA reported that “getting overseas comparability pay (OCP, a.k.a. ‘locality pay’) for nonsenior FS personnel posted overseas is overwhelmingly our members’ highest priority.”⁷

A 2006 Government Accountability Office (GAO) study discussing obstacles to attracting mid-level officers to hardship posts also noted the impact of the pay disparity as a deterrent to bidding for hardship assignments:

...officers and State personnel we interviewed both at hardship posts and in Washington, D.C. consistently cited the lack of locality pay as a deterrent to bidding at hardship positions. In 2002, we reported that the differences in the

² (...continued)

subsection (f)(1)(A), be included within a pay locality.” 5 U.S.C. 5304(f)(1)(A) excludes any position area outside the continental United States as a pay district.

³ 5 U.S.C. 5304(d)(1)(A) *Locality-based Comparability Pay* states: “compares the rates of pay under the General Schedule...with the rates of pay generally paid to non-Federal (sic) workers for the same levels of work within each pay locality, as determined on the basis of appropriate surveys that shall be conducted by the Bureau of Labor Statistics.”

⁴ U.S. Department of State. “Foreign Service Modernization Transition: \$32,000,000,” *The Budget in Brief Fiscal Year 2007*, February 2006, p. 28.

⁵ Sec. 402(a), “Salaries of Senior Foreign Service members,” of P.L. 96-465, the Foreign Service Act of 1980 or (22 U.S.C. 3962(a)).

⁶ Stephen Barr, “Effort Renewed to Bridge ‘Locality Pay’ Gap for Foreign Service Officers,” *Washington Post*, March 14, 2005, p. B2.

⁷ J. Anthony Holmes (Amb). “President’s Views — Overseas Comparability Pay: Defining Issue and Litmus Test,” *op cit*.

statutes governing domestic locality pay and differential pay for overseas service had created a gap in compensation penalizing overseas employees. This gap grows every year, as domestic locality pay rates increase, creating an ever-increasing financial disincentive for overseas employees to bid on hardship posts. After accounting for domestic locality pay for Washington, D.C., a 25 percent hardship post differential is eroded to approximately 8 percent. As estimated in our 2002 report, differential pay incentives for the 15 percent differential hardship posts are now less than the locality pay for Washington, D.C., which is currently 17 percent and can be expected to soon surpass the 20 percent differential hardship posts.⁸

On July 20, 2005, the House of Representatives passed H.R. 2601, the Foreign Relations Authorization Act 2006 and 2007. Section 305 of H.R. 2601 creates an Overseas Comparability Pay Adjustment for those at 01 levels and below posted abroad that, over a three year period, would become equal to, and then be maintained at, Washington, DC, locality pay levels.

The Administration opposed the proposed pay adjustment system for the Foreign Service in H.R. 2601, and for the first time stated under what conditions it would consider any Foreign Service pay adjustment. The Administration said, “Adjustments to overseas compensation levels should be linked to performance and considered as part of an overall review of Foreign Service personnel modernization.”⁹

For the Administration: To Move Another Element of the Federal Service to a Full Pay-for-Performance Personnel System

The George W. Bush Administration contends that the current General Schedule (GS) pay framework is a “failure.” It maintains that the “one size fits all” approach of the GS pay schedule can mask dramatic disparities in the market value of different federal jobs, and uses on-the-job longevity as a substitute for performance.¹⁰ The Administration proposes to repeal the current GS Schedule by 2010, and replace it with “a system of occupational pay groups, pay bands within those groups and pay for performance across the federal government. The new system would be a pay-for-performance system.”¹¹

⁸ U.S. Government Accountability Office. “Department of State: Staffing and Foreign Language Shortfalls Persist Despite Initiatives to Address Gaps”, GAO-06-894, August 2006, p. 22.

⁹ Executive Office of the President, Office of Management and Budget. “Statement of Administration Policy — H.R. 2601 - Foreign Relations Authorization Act, Fiscal Years 2006-2007 — House,” July 20, 2005, p. 2.

¹⁰ David McGlinche, “Bush administration developing government wide personnel reform bill,” *GovEXEC.Com*, National Journal Group, July 7, 2005.

¹¹ *Ibid.*

The Congress responded to the Administration and developed new structures for civilians working for the Departments of Defense (DOD)¹² and Homeland Security (DHS).¹³ These personnel systems, which are currently being challenged in the courts by federal employee unions,¹⁴ would cover over one-half of all non-uniformed federal employees if fully implemented.

The Administration sought to change the entire Civil Service system through its draft legislative requests the “Working for America Act (WFAA),” and also the separate request for the Foreign Service system. During much of the fall of 2005, discussions within the Administration regarding a new Foreign Service personnel modernization system took place. In February 2006, Secretary of State Rice said, “the President has requested funding to modernize the Foreign Service pay system and in so doing address the problem of the ever-growing overseas pay gap for FS 01s and below.”¹⁵ The Department of State’s *Budget in Brief for Fiscal Year 2007* elaborated on the funding request, explaining that this was “the first step of transition to a performance-based pay system and global rate of pay for Foreign Service personnel grade FS-01 and below.”¹⁶

A Merging of Interests into Legislation

On July 28, 2006, after months of discussions among the Office of Management and Budget (OMB), the Office of Personnel Management (OPM), various Departments and agencies with Foreign Service personnel, AFSA, and congressional staff, an agreed-upon legislative text was developed that served as the basis of the Administration’s request to the Congress for a new Foreign Service compensation system. This agreed upon text, in large measure, serves as the basis of discussion for the pay-for-performance/compensation sections in H.R. 6060 as reported and S. 3925 as introduced.

In arriving at this merging of views, the draft bill submitted by the Administration had to address the concerns of both the Administration and AFSA, the Foreign Service’s union. For the Administration with its desire for a performance-base system, the proposal contained a new personnel/compensation system that maintains the current nine classes with the 01 level as the highest, but within those classes contains no intervening steps. The Secretary of State determines which basic salary rate within a salary class would be paid to the members of that class, but the Secretary’s determination would take into consideration several factors,

¹² See Title XI, “Civilian Personnel Matters — Subtitle A: Department of Defense National Security Personnel System” in *P.L. 108-136, the National Defense Authorization Act for Fiscal Year 2004*, November 24, 2003.

¹³ See Title VIII Subtitle E, “Human Resources Management,” in *P.L. 107-296 Homeland Security Act of 2002*, November 25, 2002.

¹⁴ Stephen Barr, “Homeland Security Department Ends Litigation on Workplace Rules,” *Washington Post*, September 27, 2006, p. D4.

¹⁵ Secretary of State Rice. “Foreign Service Pay-For-Performance and Transition to a Global Pay Scale,” *Unclassified State ALDAC Cable 028491*, February 2006.

¹⁶ United States Department of State. *Budget in Brief, op. cit.*

some of which are negotiated with AFSA. The draft stated that salary adjustments would be based on performance, and that individuals found to be performing below the standards of their class would receive no salary adjustment.

The following were advocated by the Foreign Service Association. The role of the Selection Boards in determining performance and promotion recommendations to the Secretary is incorporated into the legislation. The current requirement that the Selection Board recommendations be followed in the order that they are presented is also maintained. The Secretary continues to have the authority to withhold action temporarily on the recommendations of the Selection Boards, but to do so would be under transparent procedures negotiated in advance with AFSA. The role of the Foreign Service's union is recognized and is consistent with current procedures. Further, proposed legislation contain assurances that a sufficient pool of funds will be allocated to implement a pay-for-performance system, and an assurance that in April 2008, a new Foreign Service worldwide compensation schedule shall become effective with pay at the Washington, DC level.

However, a key question for the Department of State and the Foreign Service is whether the proposal would avoid the labor-management problems affecting DOD and DHS. Currently the full implementation of the personnel systems for DOD and DHS is being contested by actions in the courts as federal employee unions seek to block the pay-for-performance system and the associated labor-management rules, contending that they do not provide for adequate employee protection and collective bargaining rights.¹⁷ Because the Foreign Service would forgo an automatic 3% in-grade step increase plus the annual ECI and locality pay adjustments and accept performance based adjustments with unknown percentages of increases, the Foreign Service association sought assurances that the system would be fair to its employees. In this case, both labor and management concluded that the proposal of July 28 was significantly different enough from the other pay-for-performance proposals, and the Foreign Service system was unique enough, that a conversion to a pay-for-performance system could be mutually beneficial.

The President of the American Foreign Service Association, Ambassador J. Anthony Holmes, earlier explained his views regarding the general concept of tying a pay-for-performance system with an overseas comparability pay system stating:

Pay for performance is an unknown for most of us. From media reports of DOD/DHS efforts to convert their civil servants to a PFP system and the administration's Working for America Act targeting the rest of the Civil Service, one can easily view it as menacing, ideological, and anti-employee. But it is clear from State's own experience with the Senior FS conversion to PFP two years ago that it should be possible to make this work and have a win-win situation all around. The reality is that the present FS personnel system, with its rank-in-person, not in-job, annual evaluations, and competitive up-or-out system

¹⁷ Stephen Barr, "Homeland Security Department Ends Litigation on Workplace Rules," *Washington Post*, *op cit*.

is inherently PFP already. So the changes in the system should be much less dramatic than many of our members fear.¹⁸

The Current Foreign Service Compensation System

The Foreign Service personnel and compensation systems are very different from the Civil Service system. One needs to understand these differences to appreciate the degree of change that the proposed legislation would affect. Further, the Senior Foreign Service (SFS) personnel system became performance-based two years ago when the Senior Executive Service (SES) was changed. But unlike the SES,¹⁹ the experience for the SFS has been viewed more positively because of the different nature of the existing, decades-old Foreign Service personnel system.

Similarities to the Civil Service System

- Like the Civil Service system, the Foreign Service system currently has both levels or ranks, and within these levels there are in-grade step adjustments that periodically allow an individual's salary to increase without getting a promotion.
- The members of the Foreign Service regularly receive an Employment Cost Index (ECI) adjustment equivalent to their Civil Service counterparts. Foreign Service personnel serving in a Locality Pay area also receive a Locality Pay adjustment equal to that which Civil Service personnel receive in the same locale.

Differences to the Civil Service

- Foreign Service personnel carry their rank in person and not in position as do members of the Civil Service. Thus a member of the Foreign Service may be an 02 Officer successfully holding an 01 position, but receives the salary of an 02 officer, and when evaluated for a promotion, may or may not receive a promotion to an 01 level.
- FS personnel have their performance reviewed annually for promotions regardless of the position they hold.

¹⁸ J. Anthony Holmes (Amb). "President's Views: The Pay-for-Performance/OCP Trade-Off: Poisoned Chalice or Win-Win," *The Foreign Service Journal*, April 2006, p. 5.

¹⁹ Testimony of Carol A. Bonosaro, President of the Senior Executives Association before the Senate Homeland Security and Governmental Affairs Committee's Subcommittee on the Oversight of Government Management, the Federal Workforce and the District of Columbia, September 26, 2006. Carol Bonosaro stated that "(1) Many Senior Executives believe that de facto quotas are being enforced that are affecting final performance ratings; (2) Senior Executives see no clear, consistent correlation between ratings and pay adjustments or how bonuses are distributed; and (3) Senior Executives doing a good job at the fully successful or higher level often receive no salary adjustment.... 40 percent see the system as having a negative effect on morale."

- FS personnel are judged, in terms of promotions, by Selection Boards of their colleagues and not by their supervisors, and the performance determinations are based on Employee Evaluation Reports (EER). The factors used to judge performance are negotiated with AFSA about a year ahead of the reviewing cycle, and everyone is aware of the criteria upon which they will be judged. AFSA is present when management briefs the Selection Boards on the criteria and expectations are explained.
- Selection Boards make their recommendations for promotions to the Secretary, and, by law, the Secretary must follow those recommendations in the order presented. The Secretary can temporarily withhold the recommendations of a Selection Board under negotiated procedure but the final decision is left to a Selection Board for action.²⁰
- The FS is an up-or-out system with promotions required in terms of both “Time-in-Class” (TIC) and “Time-in-Service” (TIS). If an individual exceeds these limits, the individual is separated/retired from the Service. In general, because of this system, an individual is separated/retired from the Service when they are in their mid-50s as an O1 or O2 rank.
- Selection Boards are required to identify and designate those individuals who are ranked at the bottom 5% of their class. If an individual is “low ranked” twice in a five-year period, and the employee had different rating officials in these two years of “low ranking,” that individual is referred to a Performance Standards Review Board for possible separation from the Service.²¹ Beyond the low ranking procedure, however, the Selection Board also can refer others directly to the Performance Standards Review Board to be considered for separation from the Service.

Current Legislative Proposals: H.R. 6060 and S. 3925

Because the Administration’s draft bill is the basis of discussion for the House and Senate measures, the basic outline of a possible new system can be derived from considering the similarities between these two bills. For instance, each calls for the President to establish for non-SFS a system of nine levels with no intervening steps in each level. The bills agree that any adjustments to salary will be based on

²⁰ Sec. 605, “Implementation of Selection Board Recommendations,” of P.L. 96-465 the *Foreign Service Act of 1980* (22 U.S.C. 4005).

²¹ Sec. 231(b) “Expedited Separation Out,” of P.L. 105-277 the *Foreign Relations Authorization Act of 1998 and 1999* (112 Stat. 2681-826).

performance and that, if a person is judged to perform below the standards of his or her class, that individual will not receive a salary adjustment of any kind for that year. There is a role for Selection Boards in both the promotion and performance determination processes, and AFSA participates in the determination of criteria by which Foreign Service members will be measured.

Substitutes are currently being considered by the authorizing committees in the House and the Senate to H.R. 6060 as reported, and S. 3925 as introduced, that could bring these bills closer together.

Similarities Between H.R. 6060 and S. 3925

Both bills authorize the following:

- The President establishes and periodically adjusts a new worldwide Foreign Service schedule consisting of nine classes with no intervening steps within each class. The new system becomes effective April 2008.
- The Secretary determines which basic salary rate within a salary class shall be paid to members. The Secretary's determination takes into account several factors, some of which are negotiated with AFSA as the recognized bargaining agent for the FS.
- All subsequent salary adjustments are based upon performance. If an individual is performing below his or her class, that individual receives no salary adjustment for that year.
- Selection Boards make recommendations to the Secretary regarding performance-based salary adjustments. As with promotions, AFSA negotiates the standards to be used by the Selection Boards in its performance determinations. Also, as in the case of promotion recommendations, the Secretary must follow the recommendations of the Selection Board, except in those cases and through procedures previously negotiated with AFSA.
- After conversion to the new system, members of the Foreign Service will not be eligible for the January ECI adjustment, locality pay, or the non-foreign area salary allowances.
- Each year, the Secretary must allocate funds to ensure that, in the aggregate, a minimum funding pool is available for performance-based adjustments that would not disadvantage employees due to the conversion to the new system.
- For those members of the Foreign Service posted in areas where locality pay is higher than the Washington, DC level or are receiving a non-foreign area allowance, the Secretary may establish a special transition rule to prevent those personnel from suffering a salary decrease. Once that person is rotated out of that assignment,

however, the compensation level for that post will be set at the worldwide scale.

- There is a one year transition compensation system in both bills which maintains the current nine levels and 14 steps. Pay is tied to the January ECI increase and to locality pay adjustments as appropriate. In April 2007, those members of the Foreign Service who are posted in non-locality pay areas receive a 9% pay increase (unless the President sets a lower level) in their salary levels.
- In both the House and Senate substitute drafts being considered, certain authorities regarding performance pay provisions for members of the Senior Foreign Service, within-grade salary adjustments for those ranked 01 and below, salary adjustment for those not yet reviewed, and the allocation of funds for the pay-for-performance system, are designated as “Management Rights” and not subject to negotiation with labor.²²
- Both the House and Senate substitute drafts would add to existing “management rights,” but they also recognize the ability of management and labor to negotiate the procedures that management officials observe in exercising their rights, and an appropriate process to consider the situation of those adversely affected by management determinations.²³
- Both the House and the Senate drafts being developed also clarify that judgments with respect to pay determinations, within-grade pay adjustments, and the allocation determined to meet performance pay requirements are not subject to grievances by amending the list of issues excluded from the definition of “grievance.”²⁴

Difference Between the Two Bills

The key difference between these two bills is that H.R. 6060, as reported, provides the Secretary “sole and exclusive” discretion in making certain determinations, such as which basic salary rate within a band of rates of pay members of the Foreign Service would receive. S. 3925, as introduced, does not include the phrase, “in the Secretary’s sole and exclusive discretion.”

Initially, the phrase “Secretary’s sole and exclusive discretion” was insisted upon by the Administration. Because this phrase could be interpreted as curtailing

²² Sec. 1005(a) “Management Rights” in the *Foreign Service Act of 1980*, P.L. 96-465 (22 U.S.C. 4105(a)).

²³ Sec. 1005 (b) “Management Rights” in the *Foreign Service Act of 1980*, P.L. 96-465 (22 U.S.C. 4105(b)).

²⁴ Sec. 1101(b) “Definition of Grievance,” in the *Foreign Service Act of 1980*, P.L. 96-465 (22 U.S.C. 4131(b)).

traditional bargaining rights to negotiate procedures for the pay for performance system and appropriate arrangements for employees adversely impacted by the change to such a system, many who are concerned about employee rights have serious concerns about the inclusion of this phrase in the legislation. AFSA has stated that while it would prefer not having this phrase in legislation, when both the other provisions also in the bill and the legislative history are considered *in toto*, it is clear that the intent of Congress is to not have the Secretary's authority totally unfettered.

The draft substitutes being developed for H.R. 6060, as reported, and S. 3925, as introduced, exclude the phrase "in the Secretary's sole and exclusive discretion." Instead, both substitutes would expand the existing "Management Rights" authorities under the Foreign Service Act of 1980 to include within grade salary adjustments and the allocation of funds to cover these adjustments. The existing provisions regarding "Management Rights" also would continue to provide for labor and management to negotiate procedures in making within grade salary adjustment determinations, and appropriate arrangements for those adversely affected by management decisions. Both substitutes further clarify that those areas reserved as "Management Rights" are not subject to a grievance.

Areas of Continuing Concerns Regarding the Legislative Proposal

During the development of the July 28, 2006 Administration-suggested draft bill, many issues such as a congressionally established role for the selection boards were resolved. Other issues continue to be of concern to some Members of Congress and Foreign Service members.

The Secretary's Sole and Exclusive Discretion Language Currently in the House-Reported Bill. The main area of concern continues to center on the use of the term "in the Secretary's sole and exclusive discretion." The concern is based, in part, on how one views the intent of management and the Administration, and the resulting impact upon the rights of labor. Those who are more concerned about the Administration's intent note the difficulties involved regarding the conversion to a performance-based personnel system at the Departments of Defense and of Homeland Security. They assert that it is contradictory to use the phrase "sole and exclusive" and then put limitations on the exercise of that discretion. They are concerned that in the end, "the Secretary's sole and exclusive discretion" would have greater standing than the limitations.

While preferring that the phrase not be included, AFSA's position is that because of provisions in other parts of this legislative proposal, such as the congressionally established role of selection boards in determining pay for performance salary adjustments, the use of the phrase "precepts prescribed by the Secretary" with the precepts being negotiable because of the relationship to members' conditions of employment, and the legislative history being developed, it would be clear that the Congress's intent is that the Secretary's sole and exclusive discretion is not unfettered.

If the language in both the House and Senate substitutes being developed to eliminate the phase and instead reserve certain authorities as “Management Rights” were eventually adopted, the question of the standing of the phrase “in the Secretary’s sole and exclusive discretion” would become moot.

If the phase remains, then ultimately it may be for the courts to decide what limitations would stand.

Whether Individual Foreign Service Pay Will Suffer Because of the Loss of Automatic Pay Adjustments. Some express concern that because there are no automatic increases in the new system due to the elimination of both the steps adjustments and the ties to the ECI and Locality Pay increases, the Foreign Service compensation system could fall behind the Civil Service. Both bills state that the Secretary shall annually allocate sufficient funds so that “employees, in the aggregate, are not disadvantaged in terms of the overall amount of pay available as a result of conversion to the new foreign service performance-based compensation system....” The concern for some is that on an individual basis, without the automatic 3% step increase and the ECI adjustment, among other things, the individual could fall behind what he or she would have been receiving under a system that was tied to those automatic adjustments. Those supporting the performance-based system, however, argue that the automatic increases are part of the problem of the old system.

The Frequency of the President’s Review of the Foreign Service Schedule. Similarly, while both bills require the President to establish and periodically adjust a new worldwide Foreign Service schedule, currently there is no agreed upon language in the bills as to how often the President will make adjustments.

The salary range of the class created by the President establishes a floor and ceiling for a person in a particular class. The concern is that the ceiling for that class could end up below what would be an inflation-adjusted level if the class ranges are not adjusted by the President frequently enough.

S. 3925 as introduced states that “The President shall establish, annually review, and periodically adjust....” The House draft being considered as a substitute to H.R. 6060, as reported, now also includes the phrase, “annually review.” This issue may become moot. However, unlike the Senate bill or the Senate draft substitute, the House draft bill also provides guidance with regard to periodic adjustments so that, to the maximum extent practicable, the minimum salary rates for the nine salary classes of the new Foreign Service Schedule maintain comparability to the minimum rates of basic pay in effect for the nine highest grades of the General Schedule, respectively.

Anticipated Cost

In its February budget submission, the Administration requested \$32 million to implement the April 2007 transition phase 9% increase in salaries for those posted abroad. The Congressional Budget Office (CBO) estimated that the costs resulting from the new Foreign Service Compensation System being proposed in H.R. 6060 would “cost about \$32 million in 2007, \$99 million in 2008, and an average of \$141

million a year over the 2009-2011 period, assuming appropriation of the necessary funds.”²⁵

While the Administration requested funding for FY2007, currently neither the pertinent appropriations bills, H.R. 5672, the Science, State, Justice, Commerce, and Related Agencies Appropriations Bill, Fiscal Year 2007, nor the House or Senate version of H.R. 5522, the Department of State, Foreign Operations, and Related Programs Appropriations Bill, 2007, contains any set-aside or earmark for funds to implement this program. If the changes in the Foreign Service personnel system are enacted without relevant changes in the appropriations bills, the foreign affairs departments and agencies would have to fund the Foreign Service changes from other parts of their appropriated budgets or seek additional funding through a supplemental appropriations.

²⁵ U.S. Congress, House Committee on International Relations, “The Department of State Authorization Act of 2006,” Report to accompany H.R. 6060, 109th Cong. 2nd Sess., H.Rept. 109-706, September 29, 2006, p. 7.